86-1458

Docket No.

In the Supreme Court of the United States

October Term, 1986

MICHAEL KEITH VADEN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether criminal convictions and ensuing penitentiary sentences can pass constitutional muster where the Trial Court improperly based its findings of guilty on its articulated requirement that the defendant disprove the State's case and prove his innocence?

2. Whether a criminal conviction of the petitioner can be sustained where the Trial Court erroneously failed to apply the constitutionally recognized reasonable-doubt standard but in its place applied a standard that required proof of fabricated testimony by the prosecution's complaining witness as the sole circumstance that would result in acquittal?

3. Whether the Due Process Clause protects petitioner against criminal conviction where the sole evidence against him was the frequently contradicted testimony of a 10 year old prosecutrix and thereby constitutionally insufficient?

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IN THE

SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Petitioner, Michael Keith Vaden, prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Virginia rendered in this proceeding on January 16, 1987, denying his petition to set aside a judgment of that court rendered on December 10, 1986, and for a rehearing,

refusing his petition for appeal from a final order of conviction and sentencing of the Circuit Court of the City of Virginia Beach, Virginia, on June 12, 1985.

OPINIONS BELOW

The Order appealed from was the refusal by the Supreme Court of Virginia on January 16, 1987, refusing to set aside the judgment rendered by that Court on the 10th day of December, 1986, and to grant a rehearing thereto. That Order was entered without an Opinion by the Court. That Order is provided in the Appendix hereto.

The Order of December 10, 1986, of the said Supreme Court of Virginia refused the Petition for Appeal, by the current petitioner from orders of the Court of Appeals of Virginia of April 4, 1986, and January 24, 1986, respectively ruling that petitioner's conviction in the Circuit Court of the City of Virginia

Beach and sentencing him to twenty (2) years confinement in the penitentiary, with 14 years suspended, was proper and denying an appeal thereof.

Those Orders are reproduced in the Appendix hereto.

Petitioner was convicted by the Circuit Court of the City of Virginia Beach on the 31st day of April, 1985, of the crimes of sodomy and aggravated sexual battery and sentenced on the 12th day of June, 1985, to confinement in the penitentiary of the Commonwealth of Virginia, copies of which Orders are made a part of the Appendix hereto.

JURISDICTION

Jurisdiction of this Court is invoked for certiorari to the final judgments of the Supreme Court of Virginia, the court of last resort of the Commonwealth of Virginia, of January

16, 1987, denying petitioner's request to set aside the judgment of said Court rendered on the 10th day of December, 1986, in effect, affirming the criminal convictions and sentences to confinement in the penitentiary of the Commonwealth of Virginia by the Circuit Court of the City of Virginia Beach.

CONSTITUTIONAL PROVISIONS

This case invokes application of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. The Nature of the Case and Proceedings Below

Vaden was indicted by the Grand Jury of the Circuit Court of the City of Virginia Beach on two (2) counts of forcible sodomy under § 18.2-67.1 of the Code of Virginia and two (2) counts of aggravated sexual battery under §

18.2-67.3 of the Code of Virginia with a child less than thirteen (13) years of age. At a bench trial on April 3, 1985, the Honorable Edward W. Hanson, Jr., found him guilty of one (1) count of forcible sodomy (cunnilingus) and two (2) counts of aggravated sexual battery. Vaden was acquitted of the other forcible sodomy (fellatio).

The matter was continued to June 12, 1985, for sentencing and a presentence report ordered.

On June 12, 1985, Vaden moved the Trial Court to reconsider its finding of guilt and after argument of counsel, the motion was overruled.

Vaden was then sentenced to ten (10) years on the sodomy charge and five (5) years on each of the aggravated sexual battery charges, the sentences to run consecutively with each other for a total term of twenty (20) years.

Thereupon, the Court suspended eight (8) of the ten (10) years on the sodomy charge and three (3) of the five (5) years on each of the aggravated sexual battery charges, conditioned on twenty (20) years' good behavior. The effect of this was to leave six (6) years to serve.

The petitioner has timely appealed to the Court of Appeals of Virginia, the intermediate appellate forum, and to the Supreme Court of Virginia, the court of last resort. All Petitions thereto for appeals and rehearings have been denied.

Review of the judgment of the Supreme Court of Virginia is sought. The federal questions sought to be reviewed herein were timely raised in the Trial Court and both appellate courts of the Commonwealth of Virginia.

In the Order of June 12, 1985, of the Circuit Court of the City of Virginia Beach, reference is made to the motion by petitioner's counsel that the Court reconsider its finding of guilt. That motion was based on the federal question sought to be reviewed herein.

In the Order of the Court of Appeals of Virginia of January 24, 1986, the following reference is made:

> ... the panel is of opinion that the evidence was sufficient as a matter of law to support the convictions of the defendant and that the trial court properly applied the burden of proof and the presumption of innocence accorded the defendant....

2. Statement of Facts

Jennifer L. Edwards, the complaining witness, was born to Wanda Joyce (Vaden) Underwood April 10, 1974, thus being almost eleven (11) years of age at the time of Vaden's trial. Jennifer has a

brother, John, age three years her junior.

Wanda met Vaden in Deland, Florida, in July, 1981. They began living together in August of that year with Wanda's children, Jennifer and John. In September, they moved together to Longwood, Florida, and married in December. Vaden had enlisted in the United States Marine Corps in December, but his obligation to report was delayed until April, 1982. The family relocated to Greensboro, North Carolina, in January, 1982, to be closer to the Marine bases and to enable Wanda and the children to be with Vaden's paternal grandmother, Ruby Pitts, and her husband, Hubert D. Pitts, while Vaden was in training camp.

Vaden went into boot camp at Parris Island, South Carolina, May 19, 1982, graduating honor man of his platoon August 11, 1982, earning a promotion to

private first class.

The last of October, 1982, the family moved to Virginia Beach to be near Vaden's next duty station, which was the Marine Barracks in Norfolk, Virginia. Vaden's initial duties at the Marine Barracks was as a guard, a position he held until January, 1983, when he was assigned to the personal staff of Admiral McDonald, Commander-in-Chief of the Atlantic Fleet and Supreme Allied Commander Atlantic.

In November, 1983, Wanda went to the hospital for some female related corrective surgery. Wanda asked Mr. and Mrs. Pitts to come up from Greensboro, North Carolina, to stay with the children. The children had a "somewhat" close relationship with Mrs. Pitts, having given her the "Grandmother of the Year Award".

Mr. and Mrs. Pitts stayed with Jennifer and John from November 28 to

December 2, 1983. During that time, Vaden was only home two nights, the first night when Wanda was still there and one night while she was away. While Wanda was in the hospital, the children slept in their own beds, with Mr. Pitts sleeping in the double bed with John. Both children slept in a single room upstairs. The other upstairs bedroom was that of Wanda and Vaden. Mrs. Pitts, because of her arthritic condition slept downstairs.

The day Wanda came home from the hospital, Mr. and Mrs. Pitts went back to Greensboro. At this time the Vaden marriage was rocky. Wanda was upset because Vaden was not at home while she was in the hospital.

Vaden was not at home on Saturday, March 3, coming home late on Sunday, March 4. Wanda packed for his cruise and the two of them went to dinner the

night of March 4, 1984, to discuss their marital problems away from the children.

When Vaden left on March 5, 1984, it was understood that Wanda would decide if their marriage would resume upon his return. Her decision was that there was to be no resumption of their relationship.

Wanda testified that she was afraid of Vaden. Yet she admitted having signed an affidavit that Vaden had never harmed her. She further testified under oath in a court of law that Vaden had never harmed her. (App. A19-A20)

Because of her fear, Wanda testified, she had a male acquaintance stay at the townhouse with her and the children. She said he slept downstairs. Jennifer contradicted her mother, first denying any man stayed there at all. (App. A9-A11) Then Jennifer admitted a man came and

slept upstairs in one of the two bedrooms. (App. A9-A11) Wanda claimed this man had his own separate residence, and was only there part time for protection, while Jennifer said the "man needed somewhere to stay". (App. A9-A11) Jennifer further testified her mother slept with her (App. A9-A11) while it had already been established that Jennifer had only a small bed and John had the double bed. Patently, Wanda's and Jennfier's testimony was at odds with each other over this man.

Furthermore, Wanda admitted telling the present Mrs. Vaden, when she found out they were going to be married after the divorce, "If you are getting married, then you will get what's coming to you also". Denise Vaden, the present wife of the defendant, described the same incident, which took place just before the charges were brought against Vaden in these

words: "She told me to go ahead and marry Michael, that I would regret it, and she was going to see to it". (App. A15-A16)

It was not until October 3, 1984, after Wanda learned from Denise of the impending marriage that the charges against Vaden were placed. This was seven (7) months after the Vadens had separated and just shortly after Vaden had filed suit for divorce. Wanda was making her threat to Denise come true.

The first of the four charges allege an incident that purportedly occurred in January or February 1983, at least a year and nine months before the complaint was filed. Jennifer was eight (8) years old. She said her mother was "next door" and her brother who would then have been five (5) years old "was outside playing". She first

said that Vaden told her "if I told anyone he would kill my mother and my father and my brother," but she later corrected herself to omit "my father [Vaden]" and substitute "and me". (App. A1-A3) Vaden was acquitted of this charge.

The second charge allegedly occurred in the same time frame. This was the period when Vaden had just started as Admiral McDonald's aide and was going to night school. Again Jennifer, who was then eight (8) years old, said it occurred in the daytime, her mother was next door (again) and her five year old brother, John, was outside playing (again). Whether it was morning or afternoon, or the day of the week, or how soon after the first incident she could not say. Again, Jennifer testified Vaden threatened to kill "my mother and my brother and me". (App. A4-A5)

The third incident purportedly

took place around Thanksgiving of 1983 when Wanda was in the hospital. Jennifer testified that Vaden made her and John sleep with him in his and Wanda's bed and bedroom. This was definitely and absolutely disputed by Mr. and Mrs. Pitts, both of whom testified that during the entire time Wanda was hospitalized, Hubert Pitts slept with John and Jennifer slept in her own bed in the same room. (App. A12) They were both definite in their testimony that Michael never slept with the children. (App. A13-A14) In fact, Vaden stayed home only one night while Wanda was in the hospital (App. A6-A7) and on that night, didn't get home until the children were asleep. (App. A21-A22)

The final incident according to Jennifer occurred the day before the cruise in March. (App. A8) She testified

Vaden was packing. But Wanda always packed for Vaden. (App. A17-A18) The day before the cruise was a Sunday, yet Jennifer said her mother went to get some clothes for Vaden to take on the cruise. Again, brother John was nowhere around. (App. A8) And, again, the threat was to kill mother, brother "and me". (App. A8)

Vaden's superior officer, Lieutenant William Ray Fearn, testified that from his five (5) months knowledge of Vaden, his review of Vaden's service jacket and his discussion of Vaden with other officers and other men in the Marine Corps, he knew that Vaden had an excellent reputation for truth and veracity and an excellent reputation for being a peaceful and law-abiding citizen.

Lt. Fearn further testified he investigated Wanda's claim to the Corps that Vaden was in arrears in agreed upon

support, and found her complaint to be false and not true.

Sargeant Vaden testified on his own behalf. He categorically denied each and every accusation of sexually molesting Jennifer. He gave an account of his time as best he could after such a length of time. Where he could refute the charges by outside witnesses, he produced such witnesses. While Ruby Pitts is his grandmother, she and her husband, Hubert, are the only persons who could put the lie to Jennifer's charge other than Vaden himself.

Vaden put his credibility in issue. The only evidence as to his character and reputation is of the highest. He presents the picture of an outstanding member of the United States Marine Corps who advanced quickly in the ranks well ahead of normally expected advancement.

Against this we have a rejected

wife who threatens her husband's new love interest and whose ten year old child makes accusations of sexual assault that occurred two years before the complaint with the last alleged incident occurring seven (7) months before the complaint and seven (7) months since she has seen the alleged perpetrator.

The Trial Judge in summing up stated: "In order to find that the child fabricated the testimony, I have to find that the child did it through some imagination or because the thought was suggested to her by her mother or for some other reason. I cannot find that.".

ARGUMENT

I

1. Whether criminal convictions and ensuing penitentiary sentences can

pass constitutional muster where the Trial Court improperly based its findings of guilty on its articulated requirement that the defendant disprove the State's case and prove his innocence?

2. Whether a criminal conviction of the petitioner can be sustained where the Trial Court erroneously failed to apply the constitutionally recognized reasonable-doubt standard but in its place applied a standard that required proof of fabricated testimony by the prosecution's complaining witness as the sole circumstance that would result in acquittal?

The judgment of conviction and sentence of the Trial Court, affirmed by the appellate courts of Virginia by their refusals to consider the matter on appeal, involve federal questions that have been decided in a way in

conflict with settled, applicable decisions of this Court.

There can be no doubt as to the fact that the Trial Court did not apply the constitutionally required reasonable-doubt standard in evaluating the evidence, as trier of fact, and in convicting the petitioner; because the Trial Court expressed the standard used by him:

> [THE JUDGE:]
>
> Mr. Lipkin, no one has ever been able to put an exact scientific definition on the term 'reasonable doubt'. We instruct the Jury as to what we think it is. We instruct the Jury as to what they must find if they have it or what they must find if they do not have it. We instruct them on what they must find to find the defendant guilty. The elements of the offenses have to be shown through testimony. So it comes down to a question of credibility.
>
> I have evaluated all the witnesses. I have

> evaluated his former wife's testimony.
>
> In order to find that the child fabricated the testimony, I have to find that the child did it through some imagination or because the thought was suggested to her by her mother or for some other reason, I cannot find that.
>
> I cannot give you a precise definition of reasonable doubt, but I can tell you that I have none. I believe the child's testimony. I believe that the incidents occurred.

Accordingly, the Trial Court established a new reasonable-doubt standard that he was required to find "that the child fabricated the testimony".

The error in the Trial Judge's application of the proper burden and presumptions as to innocence lies in that statement that he had to find that the young prosecutrix, Jennifer,

fabricated her testimony in order to acquit the petitioner. This is absolutely not so. There was no burden on Vaden to prove Jennifer fabricated her story. The only requirement was that all of the evidence create a reasonable doubt; the burden of proof and presumption of innocence would then control and the petitioner's acquittal would be mandated.

The presumption of innocence, which is overcome if there is any reasonable doubt, has been declared by this Court to be of constitutional magnitude and to be protected by the Due Process Clause. Coffin v. United States, 156 U.S. 432 (1895); Estelle v. Williams, 425 U.S. 502 (1976); In re Winship, 397 U.S. 358 (1970).

This novel and unique creation of a burden requirement on the petitioner that he establish by proof that the prosecutrix had "fabricated her testimony"

and that no lesser degree of doubt, (no matter what or how reasonable any such doubt flowing from the evidence in the case) was sufficient for an acquittal of the petitioner is constitutionally impermissible. The Trial Court's newly fashioned measure of the evidence was also violative of settled constitutional requirements in that it erroneously and improperly shifted and transferred the burden of proof, in this criminal prosecution, to the defendant. Nothing is more settled in our jurisprudence than the bedrock principles that this articulated standard offended.

Thus, in Coffin v. United States, supra:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Similarly, in Estelle v. Williams, supra:

> The presumption of innocence, although not articualted in the Constitution, is a basic component of a fair trial under our system of criminal justice.... This Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.

In the oft cited authority In re Winship, supra, it was held that the appropriate and required standard is proof beyond a reasonable doubt, which inferentially outlawed only proof of fabricated testimony, as the proper measure, as was applied by the Trial Court in this instance. Winship, supra, held that the reasonable-doubt standard is required by the Due Process Clause in criminal trials and is among the "essentials of due process and fair treatment" required, in that instance, where a juvenile was at an adjudicatory state of a criminal inquiry.

Winship, is explicit in its mandate:

> Lest there remain any doubt about the constituitonal standard of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime of which he is charged.

The Trial Court's standard of doubt is in direct collision and conflict with those well-settled constitutional mandates.

Moreover, the Trial Court, in articulating the standard for weighing the credibility of the Commonwealth's witness impermissibly shifted the burden of persuasion and burden of proof to the defendant to affirmatively disprove the essential elements of the Commonwealth's case, by some means other than the uncontradicted testimony of the defendant.

In Sandstrom v. Montana, 442 U.S. 510, such an attempt at shifting the burden of persuasion to the defendant was

found to be constitutionally infirm and impermissible. In that case this Court disapproved circumstances where the Jury could have interpreted an presumption in such a manner that the Jury could have concluded that the burden was shifted to the defendant to prove that he lacked the requisite mental state involved in those facts.

This Court thus said:

> If Sandstom's jury interpreted the presumption in that manner, it could have concluded that upon proof by the state of the slaying, and on additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in Mullany v. Wilbur, 421 U.S. 684 (1975)....

In Patterson v. New York, 432 U.S. at 215, this Court "reaffirmed" that "a state must prove every ingredient of an

offense beyond a reasonable doubt ... and may not shift the burden of proof to the defendant".

Accordingly, it is respectfully urged that the petitioner's conviction is constitutionally infirm and deficient and must be overturned.

3. Whether the Due Process Clause protects petitioner against criminal conviction where the sole evidence against him was the frequently contradicted testimony of a 10 year old prosecutrix and thereby consitutionally insufficient?

A conviction which is without evidence to support it, or even a conviction that is supported by some evidence that is plainly wrong, is offensive to the protections of the Due Process Clause.

The petitioner urges that the only evidence that even tends to support his criminal conviction is the testimony of the

10 year old prosecutrix, Jennifer, which was both contradictory and contradicted.

While the uncorroborated testimony of a 10 year old is not in and or itself insufficient, it is a circumstance, especially in combination with the impermissible reasonable-doubt standard and shifting of the burden of proof to the defendant, as cited above, that cries out for "close judicial scrutiny". Estelle v. Williams, supra.

The first of the alleged sexual offenses occurred in January or February, 1983, when Jennifer was eight years old. The last allegedly occurred in March, 1984. Jennifer made no complaint until October 3, 1984. This was one year, nine months after the first and seven months after the last. Courts have pointed out that the victim made prompt complaint of a defendant's attack.

Jennifer had great difficulty with dates such as confusing events in 1982 with 1983 and is associating holidays (Thanksgiving)

with the month of such holidays. Yet Jennifer had no problem, after her initial declaration that Vaden threatened to kill her "father" (Vaden himself), in declaring after each of the four alleged assaults that Vaden threatened to kill "my mother, my brother and me.". Similarly on three of these four occasions, brother John was outside playing and mother was either next door or at the store. The repetitive nature of these responses indicate a rehearsal that is significant in this case due to the animosity and bitterness of her mother toward Vaden and his new wife, Denise.

The child's mother, Wanda, (petitioner's ex-wife) admitted she told Denise (petitioner's present wife) that "you will get what's coming to you". Whle she denied these were threats it sounds like a threat and Denise certainly understood it to be a threat. It is too much of a coincidence that this threat came just days before

Wanda took Jennifer to file the complaints leading to the indictments. The threat was speedily put into action.

And this threat was from a rejected wife who made unfound complaints to Vaden's command of his arrears in support; a woman who testified that Vaden had been cruel to her, threatened her and she was afraid of him. Yet she admitted she had signed an affidavit before a U.S. Marine officer that Vaden had never harmed her nor threatened her. Furthermore, she admitted that she had so testified in the Virginia Beach General District Court to Vaden's peaceful nature.

It should not be forgotten that Wanda and Jennifer were totally in disagreement as to the role of the "stranger" who stayed in the house for three months after Vaden was dispossessed by Wanda. They contradicted each other as to why he was there, where he slept, his role in being there - in every

material aspect.

The only one of the four offenses where the petitioner could bring independent witnesses to back his denial was the "Thanksgiving" event. Here Jennifer said she and her brother John slept with Michael. Wanda who was in the hospital admitted that she could never get Vaden at home during this time. Vaden testified he came home only one night during this time period and then it was after 10:30 when the children were asleep. Ruby Pitts testified the children slept in their own beds in their own bedroom. Hubert Pitts, who slept in the bedroom with the children and even in the bed with John, testified that never did the children sleep with Michael. All independent evidence, bar none, refuted Jennifer's testimony.

Petitioner put his character in evidence. It is a fact along with other facts to be considered. Its weight is a matter for the

determination of the trier of facts. But it is to be considered along with other evidence. Harper v. Commonwealth, 196 Va. 723, 85 S.E.2d 249 (1955); Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947).

Vaden's character was outstanding. The uncontradicted testimony of his superior officer was that he had an excellent reputation for truth and veracity and for being a law abiding citizen. His military service record was and is exemplary. He has already been damaged beyond repair by this prosecution, engendered, it is submitted, by the revengeful nature of his former wife, Wanda.

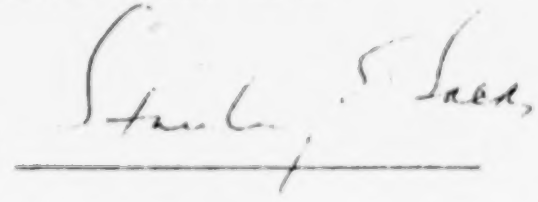
Therefore, the insufficiency of the evidence outlined above is tantamount to a denial of due process if petitioner's criminal conviction is based solely thereon and allowed to stand.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the Petition for Certiorari to this Honorable Court should be granted.

Respectfully submitted,

MICHAEL KEITH VADEN

By 

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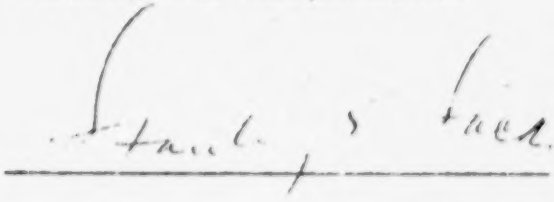
CERTIFICATE OF SERVICE

I, Stanley E. Sacks, counsel for petitioner in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 2nd day of March, 1987, I mailed three copies of the foregoing Petition for Writ of Certiorari to Stephen G. Test, Esquire, Assistant Commonwealth's Attorney for the City of Virginia Beach, the Respondent.



APPENDIX
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VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA	)	
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v.	)	RECORD
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MICHAEL KEITH VADEN,	)	
	)	
Defendant.	)	

Stenographic transcript of the testimony introduced and proceedings had in the above-entitled cause in said Court on April 3, 1985, before the Honorable Edward W. Hanson, Jr., Judge of said Court.

-----oOo-----

APPEARANCES: Ms. Deborah L. Rawls, Assistant Commonwealth's Attorney.

Messrs. Goldblatt, Lipkin Cohen, Anderson, Jenkins and Legum (Mr. Paul M. Lipkin), attorneys for the defendant.

DONN, GRAHAM & ASSOCIATES
COURT REPORTERS
VIRGINIA BEACH, VIRGINIA

BY MS. RAWLS:

Q Jennifer, I would like to direct your attention to January and February of 1983. Now, can you remember that period of time that I'm talking about?

A Yes.

Q Why would you remember that period of time?

A Because it was about a month or two after Christmas.

Q Where were you living a month or two after Christmas in January of 1983?

A At 2411 Seaview.

Q Did anything unusual happen during that two-month period while you were living there?

A Yes.

Q Would you please tell the Court what it was that happened?

A Michael asked me to come in the bedroom. He was coming out of the shower. He dropped his towel. He told me to lean down.

He told me to suck on his penis and he told me that if I told anyone he would kill my mother and my father and my brother.

Q He said he would kill your father?

A (The witness shook her head in the negative.)

Q Maybe I misunderstood.

MR. LIPKIN: No, you didn't,

BY MS. RAWLS:

Q What exactly did you just say?

A My mother and and my brother.

Q You just said he would kill your mother and father and brother. Is that what you meant to say?

A I meant to say my mother and my brother and me.

Q Had you ever heard the word "penis" before?

A Yes. That is the word that I have.

Q It is a word that you have?

A Yeah.

Q What do you mean by that word?

Q When you testified a few minutes ago when Ms. Rawls was asking you the question, you said about the mouth-on-your-privacy incident that if you said anything he was going to kill your mother and your brother. I think you later added "and me". Again, when you testified in the other courthouse, you never mentioned your mother or your brother. Do you recall that?

A Well, he did threaten my mother and me.

MS. RAWLS: The witness is upset.

THE COURT: Do you want some water?

THE WITNESS: (The witness shook her head in the negative.)

THE COURT: You will have to answer Mr. Lipkin's and Ms. Rawls' questions. I will give you a minute if you want to wash your face or anything. Do you want a handkerchief?

THE WITNESS: I have already got a napkin.

BY MR. LIPKIN:

Q Did you say he was going to kill our mother or not?

A Yes.

Q Is that the correct answer?

A He said he would kill my mother and my brother and me.

A No.

Q You used to call Mrs. Pitts Grannie Pitts, didn't you.

A Sometimes, yes.

Q Wasn't Grannie Pitts how you referred to her? You say "sometimes". Wasn't it all the time?

A Sometimes I would call her "Ruby".

Q And you get along nicely with Ruby, didn't you?

A Yes

Q You liked her?

A Yes. Sometimes we would get into fights. We would argue a little bit. Sometimes I felt like I didn't like her.

Q Now, you said you don't know how many times he stayed home while your mother was at the hosptal?

A No, I don't.

Q Do you recall when I asked you back in the other courtroom about Michael

staying at home while your mother was in the hospital, and you answered "Only one time he stayed home"?

A That is the only time that I remembered, yes.

Q You are less sure now than you were then, right, of how many times he stayed home?

A No. I'm sure he only stayed home once.

Q You are sure now. Okay. I didn't understand

Q You think it was the day before he went on the cruise?

A I think it was.

Q Where was John? Outside playing again?

A I don't remember.

Q You say Michael was packing for the cruise?

A Yes, he was.

Q You say, again, he made the threat. Was that to harm you or harm your mother or to harm your brother or to harm all three of you?

A He said that he would kill me and my brother and my mother if I told anyone.

Q The same threat that you have testified? Aren't you kind of confusing one with the other?

A No. He told the same thing over.

Q So you said nothing? When did

A No

Q You never saw him again, then, did you?

A No

Q Until when?

A Until the last court.

Q So you didn't see Michael from the time he left on the cruise until court; is that correct?

A Yes, it is.

Q So he left on his cruise in March, early March?

A (The witness nodded her head in the affirmative.)

Q And so you said nothing the rest of March, the rest of April, all of May, all of June, all of July, all of August? You never said anything to anybody?

A Yes, because I was still scared.

Q You hadn't seen him? He wasn't around, was he? As far as you knew, you hadn't seen him?

A Yes.

Q Someone was living at the house, weren't they? Some man was there, wasn't he?

A No.

Q No man was living at the house?

A No.

Q Didn't a man stay at the house with you all -- nobody but just the three of you -- until you moved out?

A For a while, it wasn't. Then my mom met a friend who needed somewhere to stay.

Q I'm sorry?

A A man needed somewhere to stay, so she let him have the other room.

Q What other room? There were only two bedrooms.

A Me and my brother shared a bedroom and my mom, she slept with me. He helped pay for the rent.

Q So there was another man in the

house there?

A Yes.

Q He had a bedroom?

A (The witness nodded her head in the affirmative.)

Q Correct?

A Yes.

Q He didn't sleep on the sofa downstairs, did he, like Ruby did?

A No. She couldn't walk up the stairs.

Q He could, so he had the bedroom?

A Ues.

Q You knew Michael wasn't coming back when your mother had packed up his stuff? Your mother told you that they were going to get a divorce; right?

Q You are married to Ruby Pitts, who is Michael's grandmother?

A That is right.

Q You know Michael's former wife, Wanda; is that correct?

A I do.

Q And you know Wanda's daughter, Jennifer Edwards?

A Yes.

Q And she has a brother? Do you know the brother's name?

A John.

Q Did you and Mrs. Pitts have an occasion to come to Virginia Beach at the end of November of 1983, to stay at the Vaden's residence while Mrs. Vaden went to the hospital?

A Yes, we did.

Q What were the sleeping arrangements there at the house, at the Vaden house?

A Jennifer had a canopy bed. John had a double bed. I slept with John

John slept with him.

Q Where was the other bedroom?

A I believe it was kindly across the hall.

Q Whose bedroom was that?

A That was Mike's and Wanda's.

Q Who slept in that one while you were there?

A Nobody at all but only two occasions Mike was home.

Q Wanda was gone about a week?

A Right

Q And Michael was out of the house most of the nights?

A Every night except a couple.

Q Now, on those couple of nights he was there, did he sleep with the kids?

A No, he did not. I had specific orders from Wanda to put them to bed at nine o'clock because they had to go to school. I would let them watch TV until about 8:30. Then I would have them take a

bath and go to bed. They always went to their rooms and went to bed.

Q Did the children ever sleep with Michael in his bed?

A No, they did not.

Q Are you certain of that?

A Yes, I'm sure.

morning. It was in the afternoon.

Q Again, you said she called you?

A Yes, sir.

Q What was the nature of the conversation?

A She told me to go ahead and marry Michael, that I would regret it, and she was going to see to it.

MR. LIPKIN: Answer the Commonwealth's Attorney.

CROSS-EXAMINATION

BY MS. RAWLS:

Q Mrs. Vaden, are you sure that you didn't call Mrs. Underwood at that point?

A I'm positive.

Q Are you sure that she didn't tell you to go ahead and marry Michael, that you would get the same thing she did?

A No.

Q You are testifying that she actually threatened you, that she said she would see to it?

A Yes

Q Were you with Michael in court back in October?

A Yes.

Q Did you know the person that was on the other side that brought the charges against him back in October of 1984?

A Did I know who was on the other side?

Q Did you know who the complaining witness was?

Q Going back just before that, who packed your personal effects for your trip?

A Wanda and myself packed with I came in on Sunday afternoon. I had a list of articles that you take. You have a seabag list that everyone should take these articles. I had this list at the house. She had the list.

Q Wanda packed?

A Which is what she usually did for any trip I went on with the Admiral.

Q When you left, then, on the 5th, it was up in the air as to whether you all would resume your marital relationship; is that correct?

A More or less.

Q It was in her hands because it was her decision to make?

A Yes, sir.

Q When did you find our her decision?

A When I returned March 15. Usualy I would call her from the airport when we arrived and she would come and pick me up.

I was informed at that time that there was no place to return to, that she would not be there to pick me up, and to get my own ride home.

Q She gave you a deadline to get home?

A Yes, sir. She said that she had to be somewhere in about thirty, forty-five minutes, that I better get home and get my stuff out.

Q You say you flew home. This cruise was a fly-in cruise?

A The cruise actually lasted bout a month. Because of the Admiral's dual responsibilities, Commander in Chief of the Atlantic, Supreme Allied Commander, it would

there is any doubt about it. They dig into his past relationship and his present. That was their decision to call Wanda.

Q Did you have anything to do with it?

A No. That is a Marine Corps investigation.

Q Did you call Wanda or anything to tell her she was going to come?

A No, I did not.

Q Did you tell her what to say at any time?

A No, sir.

Q Did she testify in the case in this court in this city?

A Yes, sir. The reason I subpoenaed her for that is because I knew that I had never done anything to her and that she had testified to the Marine Corps in that respect.

Q Did she testify in this court --

A Yes, sir.

Q -- that you hadn't done anything to her?

A Yes, sir.

Q It was dismissed?

A Yes, sir. The charges were dismissed.

Q That was October 2nd, I believe?

A Yes, sir, of '84.

Q At that time, you were living with Denise, I

more sparse time with the kids because of their schooling and everything. I saw Wanda a great deal more than I saw the children.

Wanda was the prime source in their life, not me. When I was with those kids, those kids were just like part of my own flesh and blood.

Q I appreciate your denial. I will go through each of the incidents.

The second incident, she said you put your mouth on her privacy. Did such an offense occur?

A No, sir.

Q Then she testified about the time that Wanda was in the hospital and your grandmother was here with her husband. Did you sleep in bed with the two children?

A No, sir, I did not.

Q Other than that one night that you testified to when you came home after they were sleeping, were you home that week?

A You mean other than that one night?

Q Yes.

A No, sir.

Q Until Wanda came home and went out Friday?

A That Friday.

Q That never occurred, did it?

A No, sir.

or another or do we believe that the defendaht has done the acts at a time when he felt he would not be discovered and then, for one reason or another or the obvious reason, threatened the child so she would not tell?

In this instance, the fact that he was being transferred to Camp Lejeune, North Carolina, as reflected by his then wife Wanda, and that the reason the child first told her was because she felt he would not be any danger to her anymore, is significant.

Mr. Lipkin, no one has ever been able to put an exact scientific definition on the term "reasonable doubt". We instruct the jury as to what we think it is. We instruct the jury as to what they must find if they have it or what they must not find if they do not have it. We instruct them on what they must find to find the defendant guilty. The elements of the offenses have to be shown through testimony.

So it comes down to a question of credibility.

I have evaluated all the witnesses. I have evaluated his former wife's testimony.

In order to find that the child fabricated the testimony, I have to find that the child did it through some imagination or because the thought was suggested to her by her mother or for some other reason. I cannot find that.

I cannot give you a precise definition of reasonable doubt, but I can tell you that I have none. I believe the child's testimony. I believe that the incidents occurred.

I, therefore, find the defendant guilty of the remaining indictments.

I assume that someone will want a presentence report. Is that correct?

MS. RAWLS: I think that would be helpful on both sides.

THE COURT: What date do you want to have that heard?

MS. RAWLS: We will need at least five weeks, Your Honor, I think, right now. I have any Wednesday available except for May 1st.

MR. LIPKIN: Is Sergeant Vaden going to be incarcerated?

THE COURT: What is the feeling of the Commonwealth? I assume he has made every court appearance.

MR. LIPKIN: He has made every court appearance.

If I may say this, his unit has gone to

Apr. 3, 1985 Judge Hanson

COMMONWEALTH OF VIRGINIA

vs.

MICHAEL KEITH VADEN Defendant

D# 11,131

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by C. Edwards a court reporter of Donn, Graham and Associates.

Whereupon, came Deborah Rawls, attorney for the Commonwealth, and the defendant, who stands indicted for sodomy (forcible under 13) (2), aggravated sexual battery (2), appeared in court pursuant to his recognizance heretofore entered into, and also came P. Lipkin, attorney for the defendant, said attorney being of the accused own choosing, and upon being arraigned, the defendant pleaded not guilty to said indictments tendered in person by the defendant.

And with the consent of the defendant, defendant's counsel, and the concurrence of

the attorney for the Commonwealth, and the court here entered of record, the court heard and determined the case without the intervention of a jury, and after hearing the stipulated evidence, the court finds the accused guilty of sodomy (forcible under 13) (1 count); aggravated sexual battery (2), Va. Code 18.2-67.1; 18.2-10; 18.2-67.3.

Whereupon, on motion of the accused by counsel, the court doth refer this case to the probation officer of this court for a pre-sentence report, said report to be heard on June 12, 1985. The defendant is continued on his bond for his appearance in court condition upon the defendant remaining at Camp LeJeune, N.C. and that he have no contact with the victim or the victims family.

A Copy Teste: J. Curtis Fruit,
Clerk

By _____ D.C.

Apr. 3, 1985 Date

Hanson Judge

COMMONWEALTH OF VIRGINIA

vs.

MICHAEL KEITH VADEN Defendant

D# 11,131

It is ordered that the indictment for sodomy (forcible under 13) (fellatio) is hereby dismissed.

A Copy Teste: J. Curtis Fruit, Clerk

By_____D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

Judge Hanson - June 12, 1985

COMMONWEALTH OF VIRGINIA :

D-11,131

v. : Upon convictions for Sodomy (Forcible - Under 13) Aggravated Sexual Battery(2 Counts) D00 Jan.- Feb.1983 Feb.- Mar. 1984 Nov. 25 - Dec. 5, 1983)

MICHAEL KEITH VADEN :

The Court doth Order for the recording verbatim of the evidence and incidents of the trial of this case by K. Ingram, a court reporter of Donn, Graham and Associates.

Whereupon, came D. Rawls, the Assistant Attorney for the Commonwealth, and the accused Michael Keith Vaden, who was on the 3rd day of April, 1985, found guilty of sodomy (forcible - under 13); aggravated sexual battery (2 counts), and this matter referred to the Probation Officer of this Court for a pre-sentence report, again appeared in Court pursuant to his recog-

nizance heretofore entered into, and also came P. Lipkin, attorney for the accused, said attorney being of the accused own choosing, and the accused having advised the Court that he has previously received and reviewed a copy of the Probation Officer's report waived presentment of the report by the Probation Officer in open Court, which report was ORDERED filed as part of the record in this case, and after considering said report, the defendant by counsel moved the Court to reconsider its finding of guilt, and after hearing the argument of counsel, the Court denies said motion, to which action of the Court the defendant by counsel duly excepts.

Whereupon, it being demanded of the accused if anything for himself he had or knew to say why the Court should not now proceed to pronounce judgment against him according to law and nothing being offered or alleged in delay thereof, it it ADJUDGED, OREDERED and DECREED by this Court that the

said Michael Keith Vaden, age 27, D.O.B. January 1, 1958, be and hereby is sentenced to confinement in the penitentiary of this Commonwealth for the term of 10 years on the charge of sodomy (forcible - under 13) and sentenced to serve 5 years in the state penitentiary on each of the charges of aggravated sexual battery, said sentences to run consecutively with each other for a total term of 20 years.

The Court, by the authority given under Virginia Statute, suspends 8 years on the sodomy (forcible - under 13) charge and suspends 3 years on each of the aggravated sexual battery charges, conditioned upon the defendant's good behavoir for a period of 20 years from this date, and on the further condition that the defendant pay the costs incident to this prosecution by August 14, 1985.

It is ORDERED that the Clerk of this Court forthwith forward a copy of this

Order to the Director of the Department of Corrections and the Sheriff of this City.

It is further ORDERED that the defendant be given credit for all time actually spent by the defendant in any mental institution for examination purposes or treatment prior to trial or in jail or the penitentiary awaiting trial.

Whereupon, the defendant by counsel expressed an intention of applying to the Court of Appeals for a writ of error and supersedeas thereto.

On motion of the defendant by counsel over the objection of the Assistant Commonwealth's Attorney, the Court continues the defendant on his bond pending his appeal, conditioned upon the defendant having no contact with the victim Jennifer L. Edwards and on the further condition that the defendant not leave the state of North Carolina, the defendant will be residing at Camp Lejuene, North Carolina

or at 2208 Bertie Street, Greensboro, North Carolina, 27403.

Total Sentence Imposed: 20 years

Total Time Suspended: 14 years

A Copy Teste: J. Curtis Fruit, Clerk

By_____D.C.

A Copy Teste: J. Curtis Fruit, Clerk

By_____D.C.

VIRGINIA:

In the Court of Appeals of Virginia on Friday the 24th day of January, 1986.

Michael Keith Vaden, Appellant,

against Record No. 0913-85
Circuit Court No. D-11,131/F-26, 961

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Judges Baker, Barrow and Hodges

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the panel is of opinion that the evidence was sufficient as a matter of law to support the convictions of the defendant, and that the trial court properly applied the burden of proof and the presumption of innocence accorded the defendant. Accordingly, the petition for appeal is denied.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday the 4th day of April, 1986.

Michael Keith Vaden, Appellant,

against Record No. 0913-85
Circuit Court No. D-11,
131/F-26,961

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

Before Judges Baker, Barrow and Hodges

On Consideration of the petition of the appellant to set aside the judgment rendered herein on the 24th day of January, 1986, and grant a rehearing thereot, the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

E1

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 10th day of December 1986.

Michael Keith Vaden, Appellant.

against Record No. 860336
Court of Appeals No.
0913-85

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument sumbitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:
David B. Beach,
Clerk

By:
Deputy Clerk

F1

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of January, 1987.

Michael Keith Vaden, Appellant,

against Record No. 860336
Court of Appeals
No. 0913-85

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 10th day of December, 1986, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

GI